SERVED : July 7, 1994

NTSB Order No. EA-4205

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 23rd day of June, 1994

DAVID R. HINSON,
Administrator,
Federal Aviation Administration,

Complainant,

v.

Docket SE-13021

MESFIN TSEGAYE,

Respondent.

OPINION AND ORDER

Respondent has appealed from the oral initial decision of Administrative Law Judge William E. Fowler, Jr., issued on June 2, 1993, following an evidentiary hearing.[1] The law judge affirmed an order of the Administrator, on finding that respondent had violated 14 C.F.R. 91.129(b) and (h) and

[1]The initial decision, an excerpt from the hearing transcript, is attached.

91.13(a) .[2] The law judge affirmed the Administrator's proposed 90-day suspension, but indicated his support for the suspension period beginning from the date the Administrator had possession of the certificate.[3] We deny the appeal. We first address respondent's procedural arguments.

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[2]§ 91.129(b) and (h) read:

> (b) Communications with control towers operated by the United States. No person may, within an airport traffic area, operate an aircraft to, from, or on an airport having a control tower operated by the United States unless two-way radio communications are maintained between that aircraft and the control tower. However, if the aircraft radio fails in flight, the pilot in command may operate that aircraft and land if weather conditions are at or above basic VFR [visual flight rules] weather minimums, visual contact with the tower is maintained, and a clearance to land is received. . . .
>
> (h)Clearances required. No person may, at an airport with an operating control tower, operate an aircraft on a runway or taxiway, or take off or land an aircraft, unless an appropriate clearance is received from ATC [air traffic control] . A clearance to "taxi to" the takeoff runway assigned to the aircraft is not a clearance to cross that assigned takeoff runway or to taxi on that runway at any point, but is a clearance to cross other runways that intersect the taxi route to that assigned takeoff runway. A clearance to "taxi to" any point other than an assigned takeoff runway is a clearance to cross all runways that intersect the taxi route to that point.

§ 91.13(a) provides:

> No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

[3]Apparently, respondent had delivered his certificate to the FAA on May 20, 1993 (approximately 2 weeks prior to the hearing) , to comply with another emergency suspension order. We see no basis to consider the law judge's recommendation, and respondent does not urge it on appeal.

Respondent renews two motions to dismiss raised before the law judge. We affirm the law judge's denial of these motions.

Respondent first argues that the complaint must be dismissed for violation of our stale complaint rule (49 C.F.R. 821.33) in that respondent did not receive the Notice of Proposed Certificate Action until more than 6 months after the incident. The notice was sent on November 18, 1992, by overnight courier service and by certified mail to the address respondent had on file at the FAA and it was delivered to that address the next day. Respondent's motion to dismiss avers that he actually received it some (unspecified) time later. The law judge correctly held, however, that the FAA had constructively served the notice and, therefore, the complaint would not be dismissed as stale. See Administrator v. Davila-Ramos, NTSB Order No. EA-3939 (1993). The logic of this result is inescapable: respondent should not be permitted to evade the Administrator's order through the furnishing of inaccurate address information to the FAA.[4]

Respondent's second argument supporting dismissal is that, when this order of suspension was issued demanding that he surrender his certificate, his certificate was already in the hands of the FAA (due to another enforcement action) and, because he could not physically comply with the surrender order, the entire order must be a nullity and the FAA may not subject him to

[4]We agree with the Administrator that Administrator v. Washburn, NTSB Order No. EA-3778 (1993), is not on point.

further sanction. This claim elevates form over substance and borders on the frivolous. We have rejected similar claims. Administrator v. Christopherson, 5 NTSB 205 (1985). The FAA may pursue concurrent orders and consecutive sanction terms against the same respondent, subject of course to res judicata and collateral estoppel protection, matters not relevant here. Respondent was not obliged to surrender his certificate pending his appeal of the Administrator's order in this proceeding. Requirements in one pending enforcement proceeding are not relevant to sanction in another proceeding.

Turning to the merits, respondent was the pilot in command of a Cessna 172, which he rented to fly with his wife from Leesburg, VA to Elizabeth City, NC. There is no dispute that, on arrival at Elizabeth City airport, a joint civilian and military facility with a control tower, respondent entered the airport traffic area (ATA) and then landed without first establishing 2-way radio communications and without a clearance to lands After landing, he taxied on various airport military areas, obviously lost, still without establishing communications with the tower and without a clearance to do so.

According to the controller on duty in the tower at the time, he first noticed respondent when he was on short final approach. The controller waited until the aircraft had landed (so as not to interrupt respondent's concentration on landing),

[5]An ATA is an area extending outward 5 statute miles from the center of the airport and 3,000 feet above the ground.

and spoke to him over the ground control frequency, directing that he turn right. Respondent turned left and, according to this witness, proceeded to taxi down two taxiways, turn around, and taxi back down an active runway until a security vehicle, sent by the tower, led him to the civilian terminal. The controller testified that he attempted to reach respondent a number of times using the Unicorn radio and also tried using the light gun, both with no success.[6] As a result of respondent's unexpected appearance and landing, a C-130 military aircraft was required to delay its landing.

Respondent testified that he was unable to communicate with the tower because his radios (the aircraft was equipped with two) were not operating. Respondent claimed that he flew round the airport twice, rocking his wings to try to get attention before he finally landed. Respondent denied seeing any light gun.

Respondent's substantive argument focuses on the law judge's finding that the affirmative defense of radio malfunction had not been proven. Respondent claims that the law judge improperly switched the burden of proof and that the record does not support a conclusion that his radios were working.

We find no improper allocation of the burden of proof. The Administrator made a prima facie case when he introduced probative and reliable evidence to show that 2-way radio

[6]Respondent claims that the controller tried to contact respondent only once. However, the controller testified that although he tried the ground frequency only once after that he used the Unicorn (which is not picked up and recorded on the tower tape).

communication had not been established and no clearance had been obtained. See §§ 91.129(b) and (h). The burden then shifted to respondent to show either that the Administrator's evidence was unreliable or that, for example, for some good reason, the violation should be excused (i-e , an affirmative defense) . Respondent failed to do so. In view of the law judge's refusal to credit the radio malfunction argument, respondent's testimony was not adequate to show that his action was reasonable under the circumstances.[7]

We find more than adequate support in the record for the law judge's finding that respondent did not satisfactorily or reliably establish that the reason for his actions was "the concurrent malfunction of both radios. According to respondent, both radios coincidentally malfunctioned when the aircraft was within 25-30 miles of Elizabeth City, both radios worked normally when he departed Elizabeth City 2 days later, and then both radios again malfunctioned when the aircraft was close to Washington on the return flight. But , as the law judge pointed out , there is no confirmation of these coincidental malfunctions through log entries or repair orders, and respondent offered no

[7]We agree with the Administrator that respondent must do more than present a prima facie case for an affirmative defense. Respondent must prove his affirmative defense by a preponderance of the evidence. Administrator v. Thayer, NTSB Order No. EA-3380 (1991), does not provide otherwise. Indeed, that case indicates that acceptable action in the case of inability to communicate with the tower by radio requires, at a minimum, and even for aircraft already cleared for visual approach, that other communication, such as light signals, be established before landing.

real explanation for not making a log entry or written report to the aircraft's owner, especially when he testified to the importance of other pilots knowing the condition of the aircraft. Tr. at 229.[8] Respondent did not attempt to declare an emergency. The aircraft's owner denied any radio problems with the aircraft.[9] Most important, the controller testified that, within minutes of respondent's landing, the two spoke by phone and respondent told him, on being asked, that there was no problem with the radios.[10]

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[8]Thus, whether the Administrator should have examined the aircraft log, as argued by respondent, is not significant. It is well established that the Administrator, as prosecutor, has discretion in the evidence presented to meet his burden of proof.

'Respondent makes much of the owner, Mr. Leckey, not appearing to testify, but if the owner were such a vital witness, as respondent alleges now, respondent could have subpoenaed him to appear. Respondent did not, nor did he argue at the hearing that Mr. Leckey was critical to his defense.

Respondent also criticizes the Administrator's introduction, through his inspector's testimony, of information Mr. LeckeY reported to him regarding the condition of the radios. This is hearsay evidence, but it is admissible. Administrator v. Howell, 1 NTSB 943, 944 at n. 10 (1970) and Administrator v. Repacholi, NTSB Order EA-3888 (1993). We find no error, and Mr. Leckey's statement that nothing was wrong with the radios is confirmation of an otherwise supportable result. Respondent has not convinced us that Mr. Leckey's statements are unreliable. We note in this regard that the Administrator's inspector checked Mr. Leckey's usual repair shops, and there was no record of work on these radios.

[10]The controller also testified that respondent was unable to tell him the correct frequencies for the tower or ground control. Tr. at 95.

To the extent that the law judge's decision is based on credibility assessments, there is no basis to overturn his finding. Indeed, respondent's testimony on various points was not consistent (e.g., compare Tr. at 184 (fuel almost full on

(continued...')

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied; and

2. The 90-day suspension of respondent's commercial pilot certificate shall begin 30 days from the date of service of this order.[11]

HALL, Acting Chairman, LAUBER, HAMMERSCHMIDT, and VOGT, Members of the Board, concurred in the above opinion and order.

[10](continued)
takeoff) "and 215 (had flown for 2 hours before departing for Elizabeth City and did not refuel before departing); compare Tr. at 184 (used radio to call ground control on departure from Leesburg) and 213 (acknowledged there 's 'o ground contro1 at Leesburg)). Respondent, later in his testimony, suggested with no support that the cause of the radio malfunction was a general battery failure. Tr. at 231-232.

[11]For the purposes of this order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR §61.19(f).